



UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TRENDSETTAH USA, INC. and
TREND SETTAH, INC.,
Plaintiffs,

v.

SWISHER INTERNATIONAL, INC.,
Defendant.

CASE NO: SACV 14-1664 JVS
(DFMx)

JURY INSTRUCTIONS

DATED: March 29, 2015

JAMES V. SELNA
UNITED STATES DISTRICT JUDGE

COURT'S INSTRUCTION NO. 1

Ladies and gentlemen:

These instructions are the final instructions to help you understand the principles that apply to civil trials and to help you understand the evidence you have heard.

You must not infer from these instructions or from anything I may say or do as indicating that I have an opinion regarding the evidence or what your verdict should be.

It is your duty to find the facts from all the evidence in the case. To those facts you will apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not. And you must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took an oath to do so.

1 In following my instructions, you must follow all of them and not single out
2 some and ignore others; they are all important.

COURT'S INSTRUCTION NO. 2

To help you follow the evidence, I will give you a brief summary of the positions of the parties:

This dispute concerns two companies in the cigar industry. In particular, it concerns a type of small cigar called a "cigarillo." The Plaintiffs are Trendsettah, Inc. and Trendsettah USA, Inc. For short, I will refer to the plaintiffs by the acronym TSI. The defendant is Swisher International, Inc., which I will refer to as Swisher.

In approximately 2010, the founders of TSI wanted to start their own line of cigarillos, which they called "Splitarillos." To launch the brand, TSI entered into a contract with Swisher, which is a cigar manufacturer based in Jacksonville, Florida. That contract is referred to as the Private Label Agreement, because under the contract, Swisher was to manufacture the cigarillos, and TSI was to sell them under the "private label" of "Splitarillos."

At a basic level, TSI alleges that Swisher breached the Private Label Agreement by failing to manufacture Splitarillos in the volumes that TSI was ordering. TSI alleges that Swisher did this after becoming concerned that TSI's sales of Splitarillos were eating into the market share of Swisher's own brand, called Swisher Sweets. In addition to alleging that Swisher's conduct breached the

1 Private Label Agreement, TSI contends that that conduct was anti-competitive, and
2 thus was also a violation of an antitrust law called the Sherman Act.

3
4 Swisher denies those claims and responds by contending that it did not
5 breach the Private Label Agreements, that it did not engage in any of the
6 anticompetitive conduct that TSI alleges, that Swisher performed its obligations
7 under the contracts, while TSI did not, and that Swisher did not cause TSI to suffer
8 any damages. More particularly, Swisher contends that its actions were taken as
9 efforts to assist TSI, that Swisher had its own legitimate business reasons for all of
10 its actions, that whatever harm TSI suffered was of its own doing, not Swisher's
11 and that TSI could have mitigated or avoided some or all of its damages with
12 reasonable efforts. Swisher also contends that TSI engaged in bad faith with
13 respect to Swisher.

COURT'S INSTRUCTION NO. 3

When a party has the burden of proof on any claim or affirmative defense by a preponderance of the evidence, it means you must be persuaded by the evidence that the claim or affirmative defense is more probably true than not true. You should base your decision on all of the evidence, regardless of which party presented it.

COURT'S INSTRUCTION NO. 4

The evidence you are to consider in deciding what the facts are consists of:

1. The sworn testimony of any witness;
2. The exhibits which are received into evidence; and
3. Any facts to which the lawyers have agreed.

COURT'S INSTRUCTION NO. 5

Some evidence may be admitted for a limited purpose only.

When I instruct you that an item of evidence is admitted for a limited purpose,
you must consider it only for that limited purpose and for no other.

COURT'S INSTRUCTION NO. 6

The parties have agreed to the following facts:

1. Plaintiffs Trendsettah USA, Inc. and Trend Settah, Inc. (together, "TSI") are California companies with their principal place of business in Orange County, California.
2. Akrum Alrahib, Ramzy Rahib, Mousa Rahib, and Salah Kureh are the principals/shareholders of TSI.
3. Akrum Alrahib is the founder and chief executive officer, and oversees the day-to-day operations, of TSI.
4. ABC Distributing, Inc. ("ABC") is a wholesaler and the corporate successor to Courtesy Wholesale ("Courtesy"), which ceased operations sometime around 2013.
5. TSI principal Ramzy Rahib was a principal and officer of Courtesy and remains an officer of ABC.
6. Courtesy and ABC are affiliated companies of TSI.

1 7. Sunrise Tobacco, Inc. was a company formed and owned by Akrum
2 Alrahib.

3 8. Defendant Swisher International, Inc. ("Swisher") is a cigar
4 manufacturer with its principal place of business in Jacksonville, Florida.
5 Among other products, Swisher manufactures cigarillos.

6
7 9. Swisher may be considered a household name in the cigar and cigarillo
8 market, particularly with respect to its "Swisher Sweets" brand.

9
10 10. In the United States, Swisher's products are sold nationwide, including
11 the state of California.

12
13 11. Akrum Alrahib contacted Swisher sometime in 2010 to discuss the
14 potential for Swisher to manufacture cigarillos for TSI under a private
15 label arrangement.

16
17 12. At the time, Courtesy and/or Sunrise Tobacco were existing Swisher
18 customers.

19
20 13. TSI entered the cigarillo market in an effort to capture the high
21 profitability margins in that emerging sector.

1 14. TSI and Swisher began negotiating a private label agreement in late
2 2010.

3
4 15. Trend Settah, Inc. and Swisher entered into a Private Label Agreement
5 on January 20, 2011 (the “First PLA”) to manufacture TSI’s brand of
6 cigarillos, called “Splitarillos.”

7
8 16. Pursuant to the First PLA, Swisher agreed to produce certain flavors of
9 Splitarillos for Trend Settah, Inc. and three types of packaging, 60-count
10 box, 25-count upright and 3-pack unit, for each such flavor.

11
12 17. The First PLA provided for a 2-year term and included a minimum
13 purchase requirement.

14
15 18. Trend Settah, Inc. and Swisher executed an Amendment to the First PLA
16 on January 19, 2012.

17
18 19. The Amendment to the First PLA entitled Trend Settah, Inc. to order
19 four additional flavors or varieties, to wit: Strawberry, Peach, Blueberry
20 and Natural. In lieu of Peach, however, the parties agreed to substitute
21 the Rozay flavor.

1 20. The Amendment to the First PLA required Trend Settah, Inc. to purchase
2 all then-current inventory of packaging materials for the Products by
3 March 30, 2012.

4
5 21. The Amendment to the First PLA required Trend Settah, Inc. to provide
6 Swisher with a forecast of its anticipated orders of all Products for the
7 coming months. It further provided that Trend Settah, Inc. shall use its
8 best efforts to thereafter notify Swisher of any anticipated changes in its
9 orders as forecasted if and when it becomes aware of such changes. The
10 Amendment to the First PLA further provided that Swisher shall order
11 new packaging as needed based upon the provided forecast and/or orders
12 submitted and shall immediately invoice Trend Settah, Inc. for the cost
13 thereof.

14
15 22. The Amendment to the First PLA deleted the requirement that Trend
16 Settah, Inc. order a minimum of 2,500 cases per month or 30,000 master
17 cases in the aggregate annually, and deleted any minimum order
18 requirements for Swisher branded products. Trend Settah, Inc. and
19 Swisher executed a second Private Label Agreement, which became
20 effective on February 1, 2013 (“Second PLA”).

21
22 23. The Second PLA included a production limit and maximum order
23 quantity on bulk (or loose) cigars of 3 containers, or a total of
24

1 11,761,200 cigars, per month, subject to the payment terms and
2 acceptance of such orders at Swisher's discretion based upon its
3 production capacity at any given time.

4
5 24. TSI engaged Productos del Tobacco to package the loose cigars
6 manufactured by Swisher starting in late 2012.

7
8 25. The Second PLA included an overall production limit and maximum
9 order quantity of 12 million cigars per month, with no more than 9
10 million being packaged in 3-packs.

11
12 26. The Second PLA also increased the total credit to Trend Settah, Inc. and
13 Courtesy from \$1,500,000 to \$2,000,000 and divided equally the total
14 sum into \$1,000,000 to Trend Settah, Inc. and \$1,000,000 to Courtesy.

15
16 27. The Second PLA required Trend Settah, Inc. to submit a detailed forecast
17 of its anticipated orders for the next ninety (90) days, broken down BY
18 ITEM NUMBER. On the one-month anniversary of the date the first
19 forecast is submitted, and on the same date of each month thereafter,
20 Trend Settah, Inc. shall update its forecast and project it forward another
21 thirty (30) days, such that at all times, SWISHER will have a rolling
22 ninety (90) day forecast upon which it will base its production schedule.
23 In between the required monthly updates, and in addition to that
24

1 requirement, Trend Settah, Inc. shall at all times use its best efforts to
2 promptly notify SWISHER of any change to its forecast/orders when and
3 as it becomes aware of such changes. In the absence of such notification
4 by Trend Settah, Inc., SWISHER will rely upon the forecast and the
5 production schedule based thereon, and will manufacture the Product
6 pursuant to the same.

7
8 28. The Second PLA removed the grant of exclusivity and made the
9 relationship between Trend Settah, Inc. and Swisher non-exclusive.

10
11 29. In or prior to 2013, TSI engaged Productos del Tobacco to manufacture
12 pineapple flavored Splitarillos for TSI.

13
14 30. The Second PLA had a one-year term, and it expired according to its
15 terms on February 1, 2014.

16
17 31. Although no notice was required under the Second PLA, Swisher
18 notified Trend Settah, Inc. by letter dated September 27, 2013 that it
19 would not renew the private label arrangement when the contract
20 terminated on February 1, 2014.

21
22 32. TSI bought manufacturing equipment to increase the production
23 capability of Productos del Tobacco to manufacture Splitarillos.

1 33. Swisher's primary customers are wholesalers and distributors.

2
3 34. Swisher never charged TSI higher prices for Splitarillos than those set
4 forth in the parties' agreements. TSI never paid a price in excess of the
5 contract price in effect at the time of any purchase.

6
7 35. Sales volume in the cigarillo market increased as a whole from the third
8 quarter of 2013 to the third quarter of 2015.

9
10 36. TSI did not personally witness any Swisher representative remove
11 Splitarillos products or advertising and marketing materials from stores.

12
13 37. TSI did not personally witness any Swisher representative make
14 disparaging remarks about TSI or Splitarillos.

15
16 38. TSI is not aware of any customers that entirely stopped doing business
17 with TSI as a result of Swisher's alleged acts of disparaging Splitarillos
18 or TSI, or removing Splitarillos products or advertising and marketing
19 materials from stores.

20
21 You should treat these facts as having been proved.

COURT'S INSTRUCTION NO. 7

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is proof of one or more facts from which you could find another fact. You should consider both kinds of evidence. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence.

By way of example, if you wake up in the morning and see that the sidewalk is wet, you may find from that fact that it rained during the night. However, other evidence, such as a turned on garden hose may provide a different explanation for the presence of water on the sidewalk. Therefore, before you decide that a fact has been proved by circumstantial evidence, you must consider all the evidence in the light of reason, experience, and common sense.

COURT'S INSTRUCTION NO. 8

In reaching your verdict, you may consider only the testimony and exhibits received into evidence. Certain things are not evidence, and you may not consider them in deciding what the facts are. I will list them for you:

1. Arguments and statements by lawyers are not evidence. The lawyers are not witnesses. What they have said in their opening statements, will say in their closing arguments, and at other times is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way the lawyers have stated them, your memory of them controls.
2. Questions and objections by lawyers are not evidence. Attorneys have a duty to their clients to object when they believe a question is improper under the rules of evidence. You should not be influenced by the objection or by the court's ruling on it.
3. Testimony that has been excluded or stricken, or that you have been instructed to disregard, is not evidence and must not be considered. In addition sometimes testimony and exhibits are received only for a limited purpose; when I give a limiting instruction, you must follow it.

4. Anything you may have seen or heard when the court was not in session is not evidence. You are to decide the case solely on the evidence received at the trial

COURT'S INSTRUCTION NO. 9

Some witnesses, because of education or experience, are permitted to state opinions and the reasons for those opinions. Such individual are called experts. Opinion testimony should be judged just like any other testimony. You may accept it or reject it, and give it as much weight as you think it deserves, considering the witness's education and experience, the reasons given for the opinion, and all the other evidence in the case.

If forming an opinion, an expert may rely on facts which are not personally known to him or her. You may consider such facts only in weighing the expert's opinion. The fact that an expert may rely on facts not personally known to him is not proof of those facts, and may not be considered for the purpose of determining liability. Of course, such facts could be proven with evidence apart from the expert's opinion, in which case you may consider such evidence in determining liability.

Let me give you an example, suppose an expert astronomer relies upon tests of a moon rock to support his opinion that moon is made of green cheese. You may consider those tests in weighing the expert's opinion, but you may not consider the facts he relied upon as evidence that the moon is made of green cheese.

COURT'S INSTRUCTION NO. 10

There are rules of evidence that control what can be received into evidence. When a lawyer asks a question or offers an exhibit into evidence and a lawyer on the other side thinks that it is not permitted by the rules of evidence, that lawyer may object. If I overrule the objection, the question may be answered or the exhibit received. If I sustain the objection, the question cannot be answered, and the exhibit cannot be received. Whenever I sustain an objection to a question, you must ignore the question and must not guess what the answer might have been.

Sometimes I may order that evidence be stricken from the record and that you disregard or ignore the evidence. That means that when you are deciding the case, you must not consider the evidence that I told you to disregard.

COURT'S INSTRUCTION NO. 11

In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it. Proof of facts does not necessarily depend on the number of witnesses who testify about a fact.

In considering the testimony of any witness, you may take into account:

1. the opportunity and ability of the witness to see or hear or know the things testified to;
2. the witness's memory;
3. the witness's manner while testifying;
4. the witness's interest in the outcome of the case and any bias or prejudice;
5. whether other evidence contradicted the witness's testimony;
6. the reasonableness of the witness's testimony in light of all the evidence; and

1 7. any other factors that bear on believability.

2
3 The weight of the evidence as to a fact does not necessarily depend on the
4 number of witnesses who testify about it.

COURT'S INSTRUCTION NO. 12

A deposition is the sworn testimony of a witness taken before trial. The witness is placed under oath to tell the truth and lawyers for each party may ask questions. The questions and answers are recorded. When a person is unavailable to testify at trial, the deposition of that person may be used at the trial.

You heard the deposition testimony of certain witnesses. You should consider deposition testimony, presented to you in court in lieu of live testimony, insofar as possible, in the same way as if the witness had been present to testify.

Do not place any significance on the behavior or tone of voice of any person reading the question or answers.

COURT'S INSTRUCTION NO. 13

Certain charts and summaries not received in evidence may were shown to you in order to help explain the contents of books, records, documents, or other evidence in the case. They are not themselves evidence or proof of any facts. If they do not correctly reflect the facts or figures shown by the evidence in the case, you should disregard these charts and summaries and determine the facts from the underlying evidence.

COURT'S INSTRUCTION NO. 14

Certain charts and summaries were received into evidence to illustrate information brought out in the trial. Charts and summaries are only as good as the underlying evidence that supports them. You should, therefore, give them only such weight as you think the underlying evidence deserves.

COURT'S INSTRUCTION NO. 15

The purposes of the antitrust laws are to preserve and advance our system of free and open competition and to secure to everyone an equal opportunity to engage in business, trade, and commerce, by preventing unreasonable restraint or monopolization of any business or industry so that the consuming public may receive better goods and services at lower cost. This policy is the primary feature of the free enterprise system. The law promotes the concept that free competition results in the best allocation of economic resources; but the law does not guarantee success to those who enter into business because it also recognizes that in the natural operation of our economic system, some competitors are going to lose business, or even go out of business, while others gain and prosper.

COURT'S INSTRUCTION NO. 16

TSI contends that Swisher unlawfully maintained a monopoly in the relevant market. To win on its claim of monopolization, TSI bears the burden of proving each of the following elements by a preponderance of the evidence:

First, that Swisher had monopoly power in the relevant market;

Second, that Swisher willfully maintained that power through anticompetitive conduct without a legitimate business purpose for engaging in such conduct; and

Third, causal antitrust injury to competition and the relevant market.

If you find that TSI has failed to prove any of these elements, then you must find for Swisher and against TSI on this claim. If you find that TSI has proved each of these elements by a preponderance of the evidence, then you must find for TSI and against Swisher on this claim.

I will discuss each of the elements in further detail.

COURT'S INSTRUCTION NO. 17

Monopoly power is the power to control prices and exclude competition in a relevant antitrust market. More precisely, a firm is a monopolist if it can profitably raise prices substantially above the competitive level for a significant period of time. To prove its monopolization claim, one of the elements TSI must prove is that Swisher has monopoly power in a relevant antitrust market. However, monopoly power, in and of itself, is not unlawful.

I will provide further instructions about how you may determine whether TSI has met its burden of proving monopoly power in a relevant market.

COURT'S INSTRUCTION NO. 18

TSI must prove by a preponderance of the evidence that Swisher had monopoly power in a relevant market. Defining the relevant market is essential because you are required to make a judgment about whether Swisher has monopoly power in a properly defined economic market. To make this judgment, you must be able to determine what, if any, economic forces restrain Swisher's freedom to set prices for or restrict the output of the relevant market. The most likely and most important restraining force will be actual and potential competition from other firms and their products. This includes all firms and products that act as restraints on Swisher's power to set prices as it pleases. All the firms and products that exert this restraining force are within what is called the relevant market.

There are two aspects you must consider in determining whether TSI has met its burden to prove the relevant market by a preponderance of the evidence. The first is the relevant product market, the second is the relevant geographic market.

COURT’S INSTRUCTION NO. 19

The basic idea of a relevant product market is that the products within it are reasonable substitutes for each other from the buyer’s point of view; that is, the products compete with each other. TSI has the burden of proving the relevant product market by a preponderance of the evidence.

Products need not be identical or precisely interchangeable as long as they are reasonable substitutes. Thus, for example, if people seeking to cover leftover food for storage considered certain types of flexible wrapping material – such as aluminum foil, cellophane, and plastic containers – to be reasonable alternatives, then all those products would be in the same relevant product market. In the case before you, the “buyer” at issue is not the end-user who purchases the product at the retail store. Instead, because the parties are manufacturers who sell primarily to wholesalers and distributors, the “buyer” here is a wholesaler or distributor. In other words, the relevant product market includes the products that a wholesaler or distributor believes are reasonably interchangeable or reasonable substitutes for each other.

To determine whether products are reasonable substitutes for each other, you should consider whether a small but significant non-transitory increase in the price of one product would result in a substantial number of wholesalers and distributors switching from that product to another. Generally speaking, a small but significant

1 non-transitory increase in price is approximately a five percent increase in price –
2 that is the “small but significant” part – over a period of one year, which is the
3 non-transitory part. The increase in price may not be due to external cost factors
4 like an increase in the cost of materials. If you find that such switching would
5 occur, then you may conclude that the products are in the same product market.
6

7 In evaluating whether various products are reasonably interchangeable or are
8 reasonable substitutes for each other, you may also consider; (1) wholesalers or
9 distributors’ views on whether products are interchangeable; (2) the relationship
10 between the price of one product and the sales of another; (3) the presence or
11 absence of specialized vendors; (4) the perceptions of either industry or the public
12 as to whether the products are in separate markets; (5) the views of TSI and
13 Swisher regarding who their respective competitors are; and (6) the existence or
14 absence of different customer groups or distribution channels.
15

16 In this case, TSI contends that the relevant product market is either non-
17 tipped cigarillos or all cigarillos. Swisher believes that is incorrect and instead
18 asserts that the relevant product market is all large cigars (including both non-
19 tipped cigarillos and tipped cigarillos and other large shapes).
20

21 If you find that TSI has proven that the relevant product market is more
22 likely than not non-tipped cigarillos or all cigarillos, then you should continue to
23 evaluate the remainder of TSI’s Sherman Act, Section 2 antitrust claim based on
24

1 TSI's definition of the relevant product market. However, if you find that Swisher
2 has proven that the relevant product market is more likely than not all large cigars
3 (including both non-tipped and tipped cigarillos and other large shapes), then you
4 should continue to evaluate the remainder of TSI's Sherman Act, Section 2
5 antitrust claim based on Swisher's definition of the relevant product market.

COURT'S INSTRUCTION NO. 20

In deciding whether TSI has proven a relevant product market, you may also consider what the law refers to as “the cross-elasticity of supply.” This, in other words, is the extent to which the producers of one product could shift their resources (such as manufacturing facilities or personnel) to producing another product in response to an increase in the price of the original product. If producers could make such a shift, they could increase supply of the original product, which would drive the original product’s prices back down to competitive levels. This would defeat any effort by a would-be monopolist to charge significantly higher prices for the original product.

Take two shoe manufacturers, for example. One produces shoes for women, and the other produces shoes for men. Generally speaking, men’s and women’s shoes are not reasonably interchangeable and, therefore, might be thought of as being in separate product markets. However, if the women’s shoe manufacturer raised its prices significantly to increase its profits, the men’s shoe manufacturer might be able to quickly shift its resources to start producing women’s shoes and then sell them at a lower price than the initial women’s shoe manufacturer. This would prevent the initial women’s shoe manufacturer from having the market power to overcharge its customers. Likewise, if the men’s shoe manufacturer raised its prices, the women’s shoe manufacturer might be able to shift its resources too. Although women would not buy men’s shoes, nor would men buy

1 women's shoes, the ability of each manufacturer to alter its production could
2 prevent the other manufacturer from raising prices significantly. Thus, in this
3 example, men's and women's shoes would be included in the same product market.
4

5 In the case before you, in determining the parameters of the relevant product
6 market you may consider manufacturers that you find have the ability to alter their
7 production to manufacture products that may reasonably be substituted with
8 Swisher's products – even if such manufacturers do not presently compete with
9 Swisher. You may consider whether the existence of such potential alternative
10 suppliers could influence the prices that Swisher charges for its product and, if so,
11 the amount of the product that these suppliers are likely to produce. However, if
12 you find that no cross-elasticity of supply exists, you may define the market solely
13 on your evaluation of whether the allegedly competing products currently in the
14 market are reasonable substitutes for each other from the wholesalers or
15 distributors' perspective.
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COURT’S INSTRUCTION NO. 21

The relevant geographic market is the area in which other manufacturers compete with Swisher with respect to the relevant product market. The relevant geographic market also is the area to which wholesalers and distributors can reasonably turn for purchases. When analyzing the relevant geographic market, you should consider whether changes in price or product offerings in one area have substantial effects on prices or sales in another area, which would tend to show that both areas are in the same relevant geographic market. The geographic market may be as large as global or nationwide, or as small as a single town or even smaller.

TSI has the burden of proving the relevant geographic market by a preponderance of the evidence. In this case, TSI claims that the relevant geographic markets are the geographic regions, or “zones” defined by the MSA data. By contrast, Swisher believes the relevant geographic market is at least nationwide and that it may also include the Dominican Republic. In determining whether TSI has met its burden and demonstrated that its proposed geographic market is proper, you may consider several factors, including:

- the geographic area in which Swisher sells and where Swisher’s wholesalers or distributors are located;

- 1 • the geographic area to which wholesalers or distributors turn for
2 supply;
- 3
- 4 • the geographic area to which wholesalers or distributors have turned
5 or have seriously considered turning for supply;
- 6
- 7 • the geographic area that suppliers view as potential sources of
8 competitors;
- 9
- 10 • whether governmental licensing requirements, taxes, or quotas have
11 the effect of limiting competition in certain areas.
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COURT'S INSTRUCTION NO. 22

If you find that TSI has proven a relevant market, then you should determine whether Swisher has monopoly power in that market. As I instructed you earlier, monopoly power is the power to control prices and exclude competition in a relevant antitrust market. Proof of monopoly power may be shown by either *direct*, or *indirect* proof. TSI has attempted to present both direct and indirect evidence of Swisher's market power. First I will discuss the standard applicable to indirect evidence.

Indirect evidence uses evidence of the structure of the market to show that a defendant has monopoly power. The evidence presented by the parties includes evidence of Swisher's market share, market share trends, barriers to entry, and the number and size of other competitors. If this evidence establishes that Swisher has the power to control prices and exclude competition in the relevant antitrust market, then you may conclude that Swisher has monopoly power in the market.

Market Share

The first factor that you should consider is Swisher's market share. Based on the evidence that you have heard about Swisher's market share, you should determine its market share as a percentage of total industry sales in this product market.

1 A market share above 50 percent may be sufficient to support an inference
2 that a defendant has monopoly power, but in considering whether Swisher has
3 monopoly power it is also important to consider other aspects of the relevant
4 market, such as market share trends, the existence of barriers to entry, the entry and
5 exit by other companies, and the number and size of competitors. Along with
6 Swisher's market share, these factors should inform you as to whether Swisher has
7 monopoly power. The likelihood that a company has monopoly power is stronger
8 the higher that company's share is above 50 percent.

9
10 A market share below 50 percent is ordinarily not sufficient to support a
11 conclusion that a defendant has monopoly power. However, if you find that the
12 other evidence demonstrates that Swisher does, in fact, have monopoly power
13 despite having a market share below 50 percent, you may conclude that Swisher
14 has monopoly power.

15 16 **Market Share Trends**

17
18 The trend in defendant's market share is something you may consider. An
19 increasing market share may strengthen an inference that a company has monopoly
20 power, particularly where that company has a high market share, while a
21 decreasing share might show that a company does not have monopoly power.

22 23 **Barriers to Entry**

1 You may also consider whether there are barriers to entry into the relevant
2 market. Barriers to entry make it difficult for new competitors to enter the relevant
3 market in a meaningful and timely way. Barriers to entry might include
4 intellectual property rights (such as patents or trade secrets), specialized marketing
5 practices, and the reputation of the companies already participating in the market
6 (or the brand name recognition of their products).

7
8 Evidence of low or no entry barriers may be evidence that defendant does
9 not have monopoly power, regardless of defendant's market share, because new
10 competitors could enter easily if defendant attempted to raise prices for a
11 substantial period of time. By contrast, evidence of high barriers to entry along
12 with high market share may support an inference that defendant has monopoly
13 power.

14 15 **Entry and Exit By Other Companies**

16
17 The history of entry and exit in the relevant market may be helpful to
18 consider. Entry of new competitors or expansion of existing competitors may be
19 evidence that defendant lacks monopoly power. On the other hand, departures
20 from the market, or the failure of firms to enter the market, particularly if prices
21 and profit margins are relatively high, may support an inference that defendant has
22 monopoly power.

1 **Number and Size of Competitors**

2

3 You may consider whether defendant's competitors are capable of

4 effectively competing. In other words, you should consider whether the financial

5 strength, market shares and number of competitors act as a check on defendant's

6 ability to price its products. If defendant's competitors are vigorous or have large

7 or increasing market shares, this may be evidence that defendant lacks monopoly

8 power. On the other hand, if you determine that defendant's competitors are weak

9 or have small or declining market shares, this may support an inference that

10 defendant has monopoly power.

11

12 **Conclusion**

13

14 If you find that Swisher has monopoly power in the relevant market, then

15 you must consider the remaining elements of this claim. If you find that Swisher

16 does not have monopoly power, then you must find for Swisher and against TSI on

17 this claim.

COURT'S INSTRUCTION NO. 23

Proof of monopoly power may be shown by either *direct*, or *indirect* proof. The last instruction I read to you concerned *indirect* proof of monopoly power. TSI also claims that it has presented *direct* proof of Swisher's monopoly power.

On the question of direct proof, TSI has the burden of proving that Swisher has the ability to raise or maintain the prices that it charges for goods or services in the relevant market above competitive levels. TSI must prove that Swisher has the power to do so by itself – that is, without the assistance of, and despite competition from, any existing or potential competitors.

TSI must also prove that Swisher has the power to maintain prices above a competitive level for a significant period of time. If Swisher attempted to maintain prices above competitive levels, but would lose so much business to other competitors that the price increase would become unprofitable and would have to be withdrawn, then Swisher does not have monopoly power.

Similarly, TSI must prove that Swisher has the ability to exclude competition. For example, if Swisher attempted to maintain prices above competitive levels, but new competitors could enter the relevant market or existing competitors could expand their sales and take so much business that the price increase would become unprofitable and would have to be withdrawn, then

1 Swisher does not have monopoly power.

2
3 The ability to earn high profit margins or a high rate of return does not
4 necessarily mean that defendant has monopoly power. Other factors may enable a
5 company without monopoly power to sell at higher prices or earn higher profit
6 margins than its competitors, such as the ability to offer superior products or
7 services, the ability to maintain an efficient business operation, or superior
8 advertising or marketing. However, an ability to sell at higher prices or earn higher
9 profit margins than other companies for similar goods or services over a long
10 period of time may be evidence of monopoly power. By contrast, evidence that
11 defendant would lose a substantial amount of sales if it raised prices substantially,
12 or that the defendant's profit margins were low compared to its competitors,
13 erratic, and/or decreasing, might be evidence that the defendant does not have
14 monopoly power.

15
16 If you find that Swisher has monopoly power in the relevant market, then
17 you must consider the remaining elements of this claim. If you find that Swisher
18 does not have monopoly power, then you must find for Swisher and against TSI on
19 this claim.

COURT'S INSTRUCTION NO. 24

If TSI has proven that Swisher has monopoly power in the relevant market, the next element TSI must prove is that Swisher wilfully acquired or maintained monopoly power through anticompetitive acts or practices. Anticompetitive acts are acts, other than competition on the merits, that have the effect of preventing or excluding competition or frustrating the efforts of other companies to compete for customers within the relevant market. Harm to competition is distinguished from harm to a single competitor or group of competitors, which does not necessarily constitute harm to competition. In addition, you should distinguish the acquisition or maintenance of monopoly power through anticompetitive acts from the acquisition or maintenance of monopoly power by supplying better products or services, possessing superior business skills, because of luck that are not unlawful.

Mere possession of monopoly power, if lawfully acquired, does not violate the antitrust laws. A monopolist may compete aggressively without violating antitrust laws, and a monopolist may charge monopoly prices without violating antitrust laws. A monopolist's conduct only becomes unlawful where it involves anticompetitive acts.

The difference between anticompetitive conduct and conduct that has a legitimate business purpose can be difficult to determine. This is because all companies have a desire to increase their profits and increase their market share.

1 These goals are an essential part of a competitive marketplace, and the antitrust laws
2 do not make these goals – or achievement of these goals – unlawful, as long as a
3 company does not use anticompetitive means to achieve these goals.

4
5 In determining whether Swisher’s conduct was anticompetitive or whether it
6 was legitimate business conduct, you should determine whether the conduct is
7 consistent with competition on the merits, whether the conduct provides benefits to
8 wholesalers and distributors, and whether the conduct would make business sense
9 apart from any effect it has on excluding competition or harming competitors. Stated
10 differently, anticompetitive conduct is behavior that tends to impair the opportunities
11 of rivals and either does not further competition on the merits or does so in an
12 unnecessarily restrictive way. It is also defined as the use of monopoly power to
13 foreclose competition, to unfairly gain a competitive advantage, or to destroy a
14 competitor.

15
16 For example, suppose there were five firms that make printers for home
17 computers and that these printers comprised a relevant product market. Suppose also
18 that Firm A developed a more efficient manufacturing process that allowed it to sell
19 profitably at a lower price than its competitors. If Firm A grew its market share and
20 achieved monopoly power by selling profitably at a lower price, it would not be
21 unlawful for Firm A to achieve monopoly power in this way. Developing more
22 efficient processes and developing the ability to sell profitably at lower prices is
23 competition on the merits and benefits consumers, and it therefore is not
24

1 anticompetitive conduct even if it has a negative effect on competitors.

2
3 Similarly, in the same example, suppose Firm B developed and patented a
4 revolutionary new printer and consumers so preferred Firm B's printer that Firm B
5 achieved monopoly power. It would not be unlawful for Firm B to achieve monopoly
6 power in this way. Firm B "built a better mousetrap," which is competition on the
7 merits and benefits consumers, and it therefore is not anticompetitive conduct.

8
9 By contrast, in the same example, suppose not only that Firm C makes printers,
10 but also that Firm C is the world's only manufacturer of computers and that there are
11 barriers to entry in the computer market such that no other firm will be able to enter
12 that market. Suppose also that Firm C altered its computers in such a way that only
13 Firm C's printers would work with its computers, and that the alteration does not
14 improve the design of Firm C's computers or provide any benefits to competition or
15 consumers – the only effect of the alteration is to exclude competing printer makers
16 from the marketplace. If Firm C thereby prevented its printer competitors from
17 competing and achieved monopoly power, it would be unlawful for Firm C to achieve
18 monopoly power in the printer market in this way.

19
20 As these examples show, the acts or practices that result in the acquisition or
21 maintenance of monopoly power must represent something more than the conduct of
22 business that is part of the normal competitive process or commercial success. They
23 must represent conduct that has made it very difficult or impossible for competitors
24

1 to compete and that was taken for no legitimate business reason. You may not find
2 that a company unlawfully acquired or maintained monopoly power if it has acquired
3 or maintained that power solely through the exercise of superior foresight and skill;
4 or because of natural advantages such as unique geographic access to raw materials
5 or markets; or because of economic or technological efficiency, including efficiency
6 resulting from scientific research; or because changes in cost or taste have driven out
7 all but one supplier; or because the market is so limited that it is impossible to
8 efficiently produce the product except by a plant large enough to supply the whole
9 demand.

10
11 If you find that TSI has proven by a preponderance of the evidence that Swisher
12 willfully acquired or maintained monopoly power through anticompetitive acts, then
13 you must consider whether TSI has proven the remaining elements of its Sherman
14 Act, Section 2 antitrust claim before making a final decision on TSI's antitrust claim.
15 If, however, you find that TSI did not prove this element by a preponderance of the
16 evidence, then you must find for Swisher and against TSI on this claim.

COURT'S INSTRUCTION NO. 25

Under the definition of anti-competitive conduct that I have just set forth, you must decide whether the conduct alleged by TSI was anti-competitive. Specifically, TSI claims that Swisher:

1. intentionally failed to fulfill TSI's orders for Splitarillos;
2. imposed an anti-competitively low cap on the number of Splitarillos it would produce under the Second PLA;
3. filled the wrong orders for Splitarillos, either in number of cases, or by shipping flavors that TSI had not ordered;
4. disparaged or adversely affected Splitarillos in the marketplace, to existing and prospective purchasers by telling wholesalers and distributors that TSI was going out of business and would no longer be receiving Splitarillos;
5. consumed TSI's line of credit by cramming the credit line with orders of Swisher products that neither TSI nor Courtesy (the company that shared the credit line) had ordered.

1 TSI contends that any combination of these alleged practices has enabled
2 Swisher to maintain, or prolong, its monopoly power. Swisher denies TSI's
3 allegations and denies that these practices were anti-competitive or used to maintain
4 or prolong any monopoly power, but instead contends that its actions were pro-
5 competitive.

6
7 If you find that Swisher has engaged in any or all of this alleged conduct, you
8 must then determine whether such conduct is exclusionary or anticompetitive as I
9 have defined those terms.

COURT'S INSTRUCTION NO. 26

I previously read you the instructions regarding TSI's claim that Swisher unlawfully engaged in a monopoly. TSI has also alleged that Swisher *attempted* to monopolize the relevant market, and that it was injured by Swisher's attempt to monopolize. This is a separate claim that you should evaluate separately.

To prevail on its claim of attempted monopolization, TSI must prove each of the following elements by a preponderance of the evidence:

First, that Swisher engaged in anticompetitive conduct;

Second, that Swisher had a specific intent to achieve monopoly power in a relevant market;

Third, that there was a dangerous probability that Swisher would achieve its goal of monopoly power in the relevant market;

Fourth, causal antitrust injury to competition.

If you find that the evidence is insufficient to prove any one or more of these elements, then you must find for Swisher and against TSI on TSI's claim of attempted monopolization. If you find that the evidence is sufficient to prove all

1 five elements as to Swisher, then you must find for TSI and against Swisher on
2 plaintiff's claim of attempted monopolization.

COURT'S INSTRUCTION NO. 27

To win on its claim for attempted monopolization, it is not sufficient for TSI to prove that Swisher intended to monopolize the relevant market. TSI must also show that Swisher engaged in anticompetitive conduct, combined with an intent to monopolize and a dangerous probability that Swisher would succeed. The same definition of anticompetitive conduct that I read to you with respect to TSI's monopolization claim applies to its attempted monopolization claim.

COURT'S INSTRUCTION NO. 28

To prevail on its attempted monopolization claim, TSI must prove that Swisher engaged in the anticompetitive conduct. The same definition of anticompetitive conduct that I read to you with respect to TSI's monopolization claim applies to its attempted monopolization claim.

TSI contends that any combination of these alleged anticompetitive practices has enabled Swisher to maintain, or prolong, its monopoly power. Swisher denies TSI's allegations and denies that it engaged in any exclusionary practices or any practices that were used to maintain or prolong monopoly power, but instead contends that its actions were procompetitive and intended to assist TSI.

If you find that Swisher has engaged in any or all of this alleged conduct, you must then determine whether such conduct is exclusionary or anticompetitive as I have defined those terms.

COURT'S INSTRUCTION NO. 29

You must determine whether Swisher had a legitimate business purpose for undertaking alleged anticompetitive conduct. If Swisher's conduct was designed to protect or further Swisher's legitimate business purposes, it does not violate the antitrust laws, even if Swisher's conduct injured TSI. A legitimate business purpose is one that benefits the actor regardless of any harmful effect on competitors, such as a purpose to promote efficiency or quality, offer a better product or service, or increase short run profits. Thus, if Swisher conduct was undertaken for a legitimate business purpose, that conduct deal does not violate antitrust laws even if it ultimately harmed TSI. The desire to maintain monopoly power or to block entry of competitors is generally not a legitimate business purpose. Thus, if Swisher's conduct harmed TSI's independent interests and made sense only to maintain monopoly power, it was not based on legitimate business purposes.

If Swisher's conduct was based in part on legitimate business reasons, even if it is also motivated by the desire to harm competitors, it does not violate the antitrust laws. It is up to you to determine whether Swisher's conduct was motivated by legitimate business purposes or whether it was designed solely to obtain or maintain monopoly power.

COURT'S INSTRUCTION NO. 30

Once you define the relevant market, then you must then decide whether Swisher had the specific intent to monopolize that market. In other words, you must decide if the evidence shows that Swisher acted with the conscious aim of acquiring the power to control prices and to exclude or destroy competition in the relevant market. The same definitions of relevant market and the elements required to prove a relevant market that I read to you with respect to TSI's monopolization claim also apply to its attempted monopolization claim.

There are several ways in which TSI may prove that Swisher had the specific intent to monopolize. There may be evidence of direct statements of Swisher's intent to obtain a monopoly in the relevant market. Such proof of specific intent may be established by documents prepared by officers or employees of Swisher at or about the time of the conduct in question or by testimony concerning statements made by officers or employees of Swisher. You must be careful, however, to distinguish between Swisher's intent to compete aggressively (which is lawful), which may even be accompanied by aggressive language, and a true intent to acquire monopoly power by using anticompetitive means.

Even if you decide that the evidence does not prove directly that Swisher actually intended to obtain a monopoly, specific intent may be inferred from what Swisher did. For example, if the evidence shows that the natural and probable

1 consequence of Swisher's conduct in the relevant market was to give Swisher
2 control over prices and to exclude or destroy competition, and that this was plainly
3 foreseeable by Swisher, then you may (but are not required to) infer that Swisher
4 specifically intended to acquire monopoly power.

COURT'S INSTRUCTION NO. 31

If you find that Swisher had the specific intent to achieve a monopoly and engaged in significant anticompetitive conduct, you also must determine if the evidence shows the next element of attempt to monopolize: namely, that there was a dangerous probability that Swisher would succeed in achieving monopoly power if it continued to engage in the same or similar conduct.

In determining whether there was a dangerous probability that defendant would acquire the ability to control price in the market, you should consider such factors as:

First, Swisher's market share;

Second, the trend in Swisher's market share;

Third, whether the barriers to entry into the market made it difficult for competitors to enter the market; and

Fourth, the likely effect of any anticompetitive conduct on Swisher's share of the market.

1 Again, the purpose of looking at these and other factors is to determine
2 whether there was a dangerous probability that a defendant would ultimately
3 acquire monopoly power. A dangerous probability of success need not mean that
4 success was nearly certain, but it does mean that there was a substantial and real
5 likelihood that defendant would ultimately acquire monopoly power.

6
7 As I previously instructed you, for a claim of actual monopolization, a
8 market share above 50 percent may be deemed sufficient. The market share
9 threshold for a claim for attempted monopoly is lower, however. Let me give you
10 some bench marks. A 30% market share is presumed insufficient for an attempted
11 monopoly claim; a 44% share is presumed sufficient if entry barriers are high and
12 competitors are unable to expand their output in response to supracompetitive
13 pricing.

COURT'S INSTRUCTION NO. 32

I am now going to instruct you on the issues of injury, causation and damages related to TSI's antitrust claim. The fact that I am giving you instructions concerning the issue of TSI's damages does not mean that I believe that TSI should, or should not, prevail in this case.

If for any reason, you reach a verdict for Swisher on the issue of antitrust liability, you should not consider the issue of damages, and you may disregard the damages instructions that I am about to give. Instructions as to the measure of damages are given for your guidance in the event you should find in favor of TSI based on a preponderance of evidence in accordance with the other instructions I have given you. You should only consider calculating damages for the antitrust claim if you first find that Swisher violated the antitrust law and that such violation directly caused injury to TSI.

COURT'S INSTRUCTION NO. 33

If you find that Swisher violated the antitrust laws and that TSI was directly injured by that violation, TSI is entitled to recover for such injury that was the direct and proximate result of the unlawful acts of Swisher. TSI is not entitled to recover for injury that resulted from other causes.

TSI claims that it suffered injury because it lost sales and profits as a result of Swisher's antitrust violation. In the normal course of competitive business activity, competitors will lose sales to each other and to third parties, for various causes that have nothing to do with antitrust law violations; and businesses can be unprofitable for causes that have nothing to do with the antitrust laws. TSI may not recover for lost sales if it lost those sales because of the superior business acumen or salesmanship of a competitor, because a competitor offered a superior product, because of lawful competition from Swisher or other competitors, because of the manner in which TSI conducted its business, or because of other lawful circumstances that exist.

TSI also may not recover if it lost profits as a result of causes that had nothing to do with Swisher's alleged unlawful conduct, such as changes in demand, increased competition from new competitors, changes in product technology, changes in market conditions, poor management or missed opportunities by TSI.

1 TSI bears the burden of showing that its injuries were caused by Swisher's
2 alleged antitrust violation – as opposed to any other factors, such as those I just
3 described to you.

4
5 If you find that TSI's alleged injuries were caused by factors other than
6 Swisher's alleged antitrust violation, then you must return a verdict for Swisher.

7
8 If you find that TSI's alleged injuries were caused in part by Swisher's alleged
9 antitrust violation and in part by other factors, then you may award damages only for
10 that portion of TSI's alleged injuries that were caused by Swisher's alleged antitrust
11 violation.

12
13 TSI bears the burden of proving damages with reasonable certainty, including
14 apportioning damages between lawful and unlawful causes.

15
16 If you find that there is no reasonable basis to apportion TSI's alleged injury
17 between lawful and unlawful causes, or that apportionment can only be accomplished
18 through speculation or guesswork, then you may not award any damages at all.

19
20 If you find that TSI has proven with reasonable certainty the amount of
21 damages caused by Swisher's alleged antitrust violation, then you must return a
22 verdict for TSI.

COURT'S INSTRUCTION NO. 34

If you find that Swisher has violated the Sherman Act as alleged by TSI, then you must decide if TSI is entitled to recover damages from Swisher.

TSI is entitled to recover damages for an injury to its business or property if it can establish three elements of injury and causation:

First, that it was in fact injured as a result of Swisher's alleged violation of the antitrust laws;

Second, that Swisher's alleged illegal conduct was a material cause of TSI's injury; and

Third, that TSI's injury is an injury of the type that the antitrust laws were intended to prevent.

The first element is sometimes referred to as "injury in fact" or "fact of damage." For a plaintiff to establish that it is entitled to recover damages, it must prove that it was injured as a result of the defendant's alleged violation of the antitrust laws. Proving the fact of damage does not require a plaintiff to prove the dollar value of its injury. It requires only that a plaintiff prove that it was in fact injured by defendant's alleged antitrust violation. If you find that TSI has established that it was

1 in fact injured, you may then consider the amount of its damages. It is important to
2 understand, however, that injury and amount of damage are different concepts and that
3 you cannot consider the amount of damage unless and until you have concluded that
4 TSI has established that it was in fact injured.

5
6 A plaintiff must also offer evidence that establishes as a matter of fact and with
7 a fair degree of certainty that the defendant's alleged illegal conduct was a material
8 cause of its injury. This means that a plaintiff must have proved that some damage
9 occurred to it as a result of the defendant's alleged antitrust violation, and not some
10 other cause. The plaintiff is not required to prove that the defendant's alleged antitrust
11 violation was the sole cause of its injury; nor need plaintiff eliminate all other possible
12 causes of injury. It is enough if plaintiff has proved that the alleged antitrust violation
13 was a material cause of its injury. However, if you find that TSI's injury was caused
14 primarily by something other than the alleged antitrust violation, then you must find
15 that TSI has failed to prove that it is entitled to recover damages from Swisher.

16
17 Finally, TSI must establish that its injury is the type of injury that the antitrust
18 laws were intended to prevent. This is sometimes referred to as "antitrust injury." If
19 TSI's injuries were caused by a reduction in competition, acts that would lead to a
20 reduction in competition, or acts that would otherwise harm consumers, then its
21 injuries are antitrust injuries. On the other hand, if TSI's injuries were caused by
22 heightened competition, the competitive process itself, or by acts that would benefit
23 consumers, then its injuries are not antitrust injuries and TSI may not recover damages

1 for those injuries under the antitrust laws. You should bear in mind that businesses
2 may incur losses for many reasons that the antitrust laws are not designed to prohibit
3 or protect against – such as where a competitor offers better products or services or
4 where a competitor is more efficient and can charge lower prices and still earn a profit
5 – and the antitrust laws do not permit a plaintiff to recover damages for losses that
6 were caused by the competitive process or conduct that benefits consumers. Even if
7 Swisher’s conduct is wrongful under some other theory, that alone is insufficient. TSI
8 must prove antitrust injury as well.

9
10 However, if TSI can establish that it was in fact injured by Swisher’s conduct,
11 that Swisher’s conduct was a material cause of TSI’s injury, and that Swisher’s injury
12 was the type that the antitrust laws were intended to prevent, then TSI is entitled to
13 recover damages for the injury to its business or property.

COURT’S INSTRUCTION NO. 35

If you find that Swisher violated the antitrust laws and that this violation directly caused injury to TSI, then you must determine the amount of damages, if any, that TSI is entitled to recover. The law provides that TSI should be fairly compensated for all damages to its business or property that were a direct result or likely consequences of the conduct you have found to be unlawful.

The purpose of awarding damages in an antitrust action is to put an injured plaintiff as near as possible to the position in which it would have been if the alleged antitrust violation had not occurred.

The law does not permit you to award damages to punish a wrongdoer – what we sometimes refer to as punitive damages – or to deter a defendant from particular conduct in the future, or to provide a windfall to someone who has been the victim of an antitrust violation. Antitrust damages are compensatory only. In other words, they are designed to compensate a plaintiff for the particular injuries it suffered as a result of the alleged violation of the law.

COURT'S INSTRUCTION NO. 36

Damages may not be based on guesswork or speculation. If you find that a damages calculation cannot be based on evidence and reasonable inferences, and instead can only be reached through guesswork or speculation, then you may not award damages.

If the amount of damages attributable to an antitrust violation cannot be separated from the amount of harm caused by factors other than the antitrust violation except through guesswork or speculation, then you may not award damages.

You are permitted to make reasonable estimates in calculating damages. It may be difficult for you to determine the precise amount of damages suffered by TSI, if any. If TSI establishes with reasonable probability the existence of an injury proximately caused by the Swisher's antitrust violation, you are permitted to make a just and reasonable estimate of the damages. So long as there is a reasonable basis in the evidence for a damages award, TSI should not be denied a right to be fairly compensated just because damages cannot be determined with absolute mathematical certainty. The amount of damages must, however, be based on reasonable, non-speculative assumptions and estimates.

TSI must prove the reasonableness of each of the assumptions upon which the damages calculation is based. If you find that TSI has failed to carry its burden of

1 providing a reasonable basis for determining damages, then your verdict must be for
2 Swisher. If you find that TSI has provided a reasonable basis for determining
3 damages, then you may award damages based on a just and reasonable estimate
4 supported by the evidence.

COURT'S INSTRUCTION NO. 37

TSI claims that it was harmed because it lost profits as a result of Swisher's alleged antitrust violation. If you find that Swisher committed an antitrust violation and that this violation caused injury to TSI, you may calculate the profits, if any, that TSI lost as a result of defendant's antitrust violation.

To calculate lost profits, you must calculate net profit: the amount by which TSI's gross revenues would have exceeded all of the costs and expenses that would have been necessary to produce those revenues. You may calculate lost profits by using the following measure:

TSI has proposed to calculate the net profits it would have earned if there had been no antitrust violation by showing evidence of the sales it would have had in the absence of the antitrust violation. If you find that TSI has shown reliable evidence of what its sales would have been in the absence of the antitrust violation, then you may calculate TSI's lost profits by considering those sales, evidence of the size of the market, and evidence relating to the profit margin TSI would have secured on such sales. You may find, however, that TSI has not shown reasonable evidence of what its sales would have been in the absence of the alleged antitrust violation, such as if TSI's market share was impacted by changed economic conditions, mismanagement, increased competition, changing technology, or other factors. You may also find that TSI has not shown reasonable evidence of the profit margin it would have incurred in

1 the absence of the alleged antitrust violation. If you find that the evidence of TSI sales
2 and/or profit margins is not reasonable, and that lost profits may only be calculated
3 using speculation or guesswork, you may not award damages for lost profits based on
4 sales or profit margins.

5
6 TSI has alternatively proposed to calculate the net profits it would have earned
7 if there had been no antitrust violation by showing evidence of other businesses that
8 were not affected by the antitrust violation. If you find that the other businesses
9 whose performance is compared to TSI's business are a reliable guide to estimate
10 what TSI's actual net profits would have been in the absence of the antitrust violation,
11 then you may calculate TSI's lost profits by comparing (a) the actual profit
12 performance of plaintiff with (b) the performance of the comparable businesses. You
13 may find, however, that the business proposed by TSI as a yardstick for its
14 performance is not representative of what TSI's sales would have been in the absence
15 of the antitrust violation, such as if TSI's profits were impacted by different economic
16 conditions, mismanagement, different levels of competition, or other factors. The two
17 businesses do not have to be identical; they need only be sufficiently similar that
18 conclusions may be drawn within the bounds of reasonableness. However, if you find
19 that the businesses proposed by TSI as a yardstick for its performance are not
20 representative of what TSI's profits would have been, and that TSI's lost profits may
21 only be calculated using speculation or guesswork, you may not award damages for
22 lost profits based on this yardstick measure.

COURT'S INSTRUCTION NO. 38

TSI claims that it was harmed because, had it not been for Swisher's alleged antitrust violation, it would have earned additional profits into the future. If you find that Swisher committed an antitrust violation and that this violation caused injury to TSI, you may calculate the future profits, if any, that TSI lost as a result of Swisher's antitrust violation. If you find that the fact of future losses is speculative or their amount is unproven, then you may not award damages for lost future profits.

To calculate lost future profits, you must make a reasonable estimate of (1) the amount of profits, if any, that TSI would have earned in future years, and (2) the length of time for which it would have earned those profits. In making this calculation, you must not engage in guesswork or speculation. In making this determination, you must consider the various uncertainties that could affect the future success of TSI's business, such as general market or economic conditions, lawful competition plaintiff would face in the future, plaintiff's management of the business, changes in technology or other business conditions, and other factors affecting TSI's future performance. If there is not evidence from which you can make a reasonable estimate of lost future profits, or if the uncertainties are such that speculation or guesswork is required, you may not award damages for lost future profits.

In calculating lost future profits, you must calculate net profit: the amount by which TSI's gross revenues would exceed all of the costs and expenses that would be

1 necessary to produce those revenues. You may calculate net profit by using the
2 following measures:

3
4 TSI has proposed to calculate the net profits it would have earned if there had
5 been no antitrust violation by showing evidence of the sales it would have had in the
6 absence of the antitrust violation. If you find that TSI has shown reliable evidence of
7 what its sales would have been in the absence of the antitrust violation, then you may
8 calculate TSI's future lost profits by considering those sales, evidence of the size of
9 the market, and evidence relating to the profit margin TSI would have secured on such
10 sales. You may find, however, that TSI has not shown reasonable evidence of what
11 its sales would have been in the absence of the alleged antitrust violation, such as if
12 TSI's sales would be impacted by changed economic conditions, mismanagement,
13 increased competition, changing technology, or other factors. You may also find that
14 TSI has not shown reasonable evidence of the profit margin it would have incurred in
15 the absence of the alleged antitrust violation. If you find that the evidence of TSI's
16 market share and/or profit margins is not reasonable, and that future lost profits may
17 only be calculated using speculation or guesswork, you may not award damages for
18 future lost profits based on market share or profit margins.

19
20 TSI has alternatively proposed to calculate the net profits it would have earned
21 if there had been no antitrust violation by showing evidence of other businesses that
22 were not affected by the antitrust violation. If you find that the other business whose
23 performance is compared to TSI's business is a reliable guide to estimate what TSI's
24

1 future profits would have been in the absence of the antitrust violation, then you may
2 calculate TSI's future lost profits by comparing (a) your estimated future profit
3 performance of TSI with (b) the performance of the comparable businesses. You may
4 find, however, that the businesses proposed by TSI as a yardstick for its performance
5 are not representative of what TSI's profits would have been in the absence of the
6 antitrust violation, such as if TSI's profits would be impacted by different economic
7 conditions, mismanagement, different levels of competition, or other factors. The two
8 businesses do not have to be identical; they need only be sufficiently similar that
9 conclusions may be drawn within the bounds of reasonableness. However, if you find
10 that the business proposed by TSI as a yardstick for its performance is not
11 representative of what TSI's profits would have been, and that, TSI's future lost
12 profits may only be calculated using speculation or guesswork, you may not award
13 damages for future lost profits based on this yardstick measure.

14
15 If you award damages for future lost profits, you must discount the amount to
16 its present value, using a discount rate of interest that you find reasonable. This is
17 because the right to receive a certain sum of money at a future date is worth less than
18 the same amount of money in hand today – this is known as the time value of money.
19 For example, if you had a choice to receive \$1,000 today or a year from now, you
20 would be better off receiving the money today and earning interest on it for a year –
21 you would then have something more than \$1,000 in a year from now. Similarly, if
22 you had a right to \$1,000 a year from now and you asked for the money today, the
23 person owing you the money a year from now could properly give you a lower
24

1 amount, reflecting the value that could be earned on that money over the next year.
2 This lower amount is known as an amount discounted to present value.
3

4 TSI has alternatively proposed to calculate the net profits it would have
5 earned if there had been no antitrust violation by showing evidence of other
6 businesses that were not affected by the antitrust violation. If you find that the
7 other businesses whose performance is compared to TSI's business are a reliable
8 guide to estimate what TSI's actual net profits would have been in the absence of
9 the antitrust violation, then you may calculate TSI's lost profits by comparing (a)
10 the actual profit performance of plaintiff with (b) the performance of the
11 comparable businesses. You may find, however, that the business proposed by TSI
12 as a yardstick for its performance is not representative of what TSI's sales would
13 have been in the absence of the antitrust violation, such as if TSI's profits were
14 impacted by different economic conditions, mismanagement, different levels of
15 competition, or other factors. The two businesses do not have to be identical; they
16 need only be sufficiently similar that conclusions may be drawn within the bounds
17 of reasonableness. However, if you find that the businesses proposed by TSI as a
18 yardstick for its performance are not representative of what TSI's profits would
19 have been, and that TSI's lost profits may only be calculated using speculation or
20 guesswork, you may not award damages for lost profits based on this yardstick
21 measure.

22 If you award damages for future lost profits, you must discount the amount
23 to its present value, using a discount rate of interest that you find reasonable. This
24

1 is because the right to receive a certain sum of money at a future date is worth less
2 than the same amount of money in hand today – this is known as the time value of
3 money. For example, if you had a choice to receive \$1,000 today or a year from
4 now, you would be better off receiving the money today and earning interest on it
5 for a year – you would then have something more than \$1,000 in a year from now.
6 Similarly, if you had a right to \$1,000 a year from now and you asked for the
7 money today, the person owing you the money a year from now could properly
8 give you a lower amount, reflecting the value that could be earned on that money
9 over the next year. This lower amount is known as an amount discounted to
10 present value.

COURT'S INSTRUCTION NO. 39

You have heard testimony from TSI's expert, Dr. Robert DeForest McDuff, and from Swisher's expert, Dr. Alan Cox, regarding the amount of damages, if any, to which TSI is entitled and the proper amount of damages.

If you find that any of the pertinent underlying assumptions made by one of these experts in preparing a damages report is not reasonable or is not proven by a preponderance of the evidence, or if you find that one of these expert's conclusions depends on a comparison of things which have not been proven to be comparable, then you should consider this in determining the weight, if any, you will give to these assumptions and the effect they have on TSI's damages claim.

COURT'S INSTRUCTION NO. 40

TSI may not recover damages for any portion of its injuries that it could have avoided through the exercise of commercially reasonable care and prudence. Commercially reasonable care mean those measures that a prudent businessperson in the plaintiffs' position would likely have adopted, given the circumstances as they appeared at that time.

TSI is not entitled to recover damages that were caused or increased because of TSI's own inaction. The law requires an injured party to take all commercially reasonable steps it can to avoid further injury and reduce its loss. If TSI failed to take commercially reasonable steps available to it, and the failure to take those steps caused TSI greater harm than if TSI had acted, then TSI may not recover any damages for that part of the injury that it could have avoided.

Swisher has the burden of proof on this issue. Swisher must prove by a preponderance of the evidence that TSI unreasonably failed to take specific steps to minimize or limit its losses and the failure to take those specific steps resulted in its losses being greater than they would have been had TSI acted, and the amount by which TSI's loss would have been reduced had TSI taken those steps.

In determining whether TSI failed to take reasonable measures to limit its damages, you must remember that the law does not require TSI to have taken every

1 conceivable step that might have reduced its damages. The evidence must show that
2 TSI failed to take commercially reasonable measures that were open to it.

3
4 Commercially reasonable measures mean those measures that a prudent
5 businessperson in the plaintiff's position would likely have adopted, given the
6 circumstances as they appeared at the time. TSI should be given a wide latitude in
7 deciding how to handle the situation, so long as what TSI did was not unreasonable
8 in light of the existing circumstances.

COURT'S INSTRUCTION NO. 41

TSI claims that Trendsettah USA, Inc. and/or Trend Settah, Inc. entered into two contracts with Swisher for the manufacture and production of Splitarillos, the First Private Label Agreement and the Second Private Label Agreement.

TSI claims that Swisher breached the Private Label Agreements by refusing to fulfill TSI's orders for Splitarillos that it had contractually agreed to produce, and that the breach directly resulted in damages to Trendsettah USA, Inc. and/or Trend Settah, Inc.

Swisher denies that it breached either of the Private Label Agreements, including by refusing to fulfill Trendsettah USA, Inc. and/or Trend Settah, Inc.'s orders for Splitarillos.

COURT'S INSTRUCTION NO. 42

To recover damages from Swisher for breach of contract, TSI must prove all of the following:

1. That Trendsettah USA, Inc. and/or Trend Settah, Inc., on the one hand, and Swisher, on the other hand, entered into a contract;
2. That Trendsettah USA, Inc. and/or Trend Settah, Inc. did all, or substantially all, of the essential things which the contract required them to do, or that they were excused from doing those things;
3. All conditions required by the contract for Swisher's performance had occurred;
4. Swisher failed to do something material which the contract required it to do; and
5. Trendsettah USA, Inc. and/or Trend Settah, Inc. were directly harmed by that failure.

COURT'S INSTRUCTION NO. 43

The parties agree that the First PLA was in effect from January 20, 2011 through at least October 31, 2012, and that the Second PLA was in effect from February 1, 2013 through January 31, 2014. They disagree, however, as to whether a contract was in place in the three months between November 1, 2012 and January 31, 2013.

Both an offer and acceptance are required to create a contract. Swisher contends that a contract was not created because its offer to extend the First PLA through the end of 2012 was not accepted. To establish acceptance of the offer, TSI must prove that TSI communicated its agreement to the terms of the offer.

COURT'S INSTRUCTION NO. 44

This instruction relates solely to the period between November 1, 2012 and January 31, 2013, for which the parties disagree on whether a contract between them existed. Contracts can be created by the conduct of the parties, without spoken or written words. Contracts created by conduct are just as valid as contracts formed with words.

Conduct will create a contract if the conduct of both parties is intentional and each knows, or under the circumstances should know, that the other party will understand the conduct as creating a contract and the terms of that contract.

In deciding whether a contract implied in fact was created for the period between November 1, 2012 and January 31, 2013, you should consider the conduct and relationship of the parties as well as all of the circumstances.

COURT'S INSTRUCTION NO. 45

This instruction relates solely to the period between November 1, 2012 and January 31, 2013, for which the parties disagree on whether a contract between them existed. Ordinarily, if a party does not say or do anything in response to another party's offer, then it has not accepted the offer. However, if TSI proves that it and Swisher understood that the benefits of the offer were accepted for the period between November 1, 2012 and January 31, 2013, based on TSI's and Swisher's previous dealings, then there was an acceptance of that offer.

COURT'S INSTRUCTION NO. 46

In the contract in this case, there is an implied promise of good faith and fair dealing. This means that neither party will do anything to unfairly interfere with the right of any other party to the contract to receive the contract's benefits; however, the implied promise of good faith and fair dealing cannot create obligations that are inconsistent with the contract's terms. TSI contends that Swisher violated the duty to act in good faith and fairly under specific parts of the contract. To establish this claim, TSI must prove all of the following:

1. TSI and Swisher entered into a contract;
2. TSI did all, or substantially all, of the significant things that the contract required it to do, or that it was excused from having to do those things;
3. All conditions required for Swisher's performance had occurred;
4. Swisher's actions unfairly interfered with TSI's receipt of the contract's benefits;
5. Swisher's conduct did not comport with TSI's reasonable contractual expectations under specific parts of the contract; and

6. TSI was harmed by Swisher's conduct.

COURT'S INSTRUCTION NO. 47

If Swisher breached the contract and the breach directly caused Trendsettah USA, Inc. and/or Trend Settah, Inc. damages, TSI is not entitled to recover for those damages which Swisher proves by the greater weight of the evidence that TSI could have avoided with reasonable efforts.

COURT'S INSTRUCTION NO. 48

Swisher contends that TSI's breach of contract claims are barred because Swisher substantially performed all of its contractual obligations or performed those obligations nearly equivalent to those bargained for in the contract.

If you find that Swisher has proved by a preponderance of the evidence that (i) Swisher performed in good faith; and (ii) Swisher's performance was so nearly equivalent to what was bargained for that it would be unreasonable to deem it to have breached the First and Second Private Label Agreements, then you must find against TSI on its breach of contract claims.

COURT'S INSTRUCTION NO. 49

Swisher contends that with respect to the parties' contractual relationship prior to the Second PLA, TSI's claims for breach of contract and breach of the implied covenant of good faith and fair dealing are barred under the Uniform Commercial Code, as adopted under Florida law at Florida Statute Section 672.306, which sets forth standards of commercial reasonableness that apply in the context of any requirements contract. Under Florida law, a buyers' orders must be commercially reasonable. An order is not commercially reasonable if the quantity ordered by the buyer is unreasonably disproportionate to any stated estimate or in the absence of a stated estimate unreasonably disproportionate to any normal or otherwise comparable prior requirements of the buyer.

If you find that Swisher has proven by a preponderance of the evidence that any of TSI's orders were not commercially reasonable, then you should reduce the amount of damages you award to exclude damages on the portion of any such orders which were unreasonable in relation to comparable prior requirements. Let me give you an example. Suppose TSI proves damages on \$100 of orders, but Swisher has proven that \$50 of the orders were not commercially reasonable, then you may award damages only on \$50 of orders.

COURT'S INSTRUCTION NO. 50

If you find for Swisher on both the breach of contract claim and the breach of the covenant of good faith and fair dealing claim, you will not consider the matter of damages. But, if you find for TSI on either or both the breach of contract or breach of the covenant of good faith and fair dealing, you should award TSI an amount of money that the greater weight of the evidence shows will fairly and adequately compensate TSI for its damages.

If you find for TSI, you shall consider the following types of damages:

COURT'S INSTRUCTION NO. 51

Compensatory damages is that amount of money which will put TSI in as good a position as it would have been if Swisher had not breached its contractual obligations, and which naturally and directly result from the breach.

COURT'S INSTRUCTION NO. 52

Compensatory damages may also include lost profits. To be entitled to recover lost profits, TSI must prove both of the following:

1. Swisher's actions caused TSI to lose profits; and
2. TSI can establish the amount of its lost profits with reasonable certainty.

For TSI to establish the amount of its lost profits with reasonable certainty, it must prove that a reasonable person would be satisfied that the amount of lost profits is not the result of speculation or guessing. Instead of speculation or guessing, TSI must prove that there is some standard by which the amount of lost profits may be established. TSI does not have to be able to prove that the amount of lost profits can be calculated with a mathematical precision as long as it has shown there is a reasonable basis for determining the amount of the loss.

Even though TSI's business is not established or does not have a long "track record," it still may be able to establish the amount of lost profits which it may be entitled to recover if it proves that there is some standard by which the amount of lost profits may be established.

COURT'S INSTRUCTION NO. 53

Because you must decide this case based only on the evidence received in the case and on my instructions as to the law that applies, you must not be exposed to any other information about the case or to the issues it involves during the course of your jury duty. Thus, until the end of the case or unless I tell you otherwise:

Do not communicate with anyone in any way and do not let anyone else communicate with you in any way about the merits of the case or anything to do with it. This includes discussing the case in person, in writing, by phone or electronic means, via e-mail, text messaging, or any Internet chat room, blog, Web site or other feature. This applies to communicating with your fellow jurors until I give you the case for deliberation, and it applies to communicating with everyone else including your family members, your employer, and the people involved in the trial, although you may notify your family and your employer that you have been seated as a juror in the case.

But, if you are asked or approached in any way about your jury service or anything about this case, you must respond that you have been ordered not to discuss the matter and to report the contact to the court.

Because you will receive all the evidence and legal instruction you properly may consider to return a verdict: do not read, watch, or listen to any news or

1 media accounts or commentary about the case or anything to do with it; do
2 not do any research, such as consulting dictionaries, searching the Internet
3 or using other reference materials; and do not make any investigation or in
4 any other way try to learn about the case on your own.

5
6 The law requires these restrictions to ensure the parties have a fair trial based
7 on the same evidence that each party has had an opportunity to address. A juror who
8 violates these restrictions jeopardizes the fairness of these proceedings. If any juror
9 is exposed to any outside information, please notify the court immediately.

COURT’S INSTRUCTION NO. 54

If it becomes necessary during your deliberations to communicate with me, you may send a note through the bailiff, signed by your presiding juror or by one or more members of the jury. No member of the jury should ever attempt to communicate with me except by a signed writing; and I will communicate with any member of the jury on anything concerning the case only in writing, or here in open court. If you send out a question, I will consult with the parties before answering it, which may take some time. You may continue your deliberations while waiting for the answer to any question. Remember that you are not to tell anyone – including me – how the jury stands, numerically or otherwise, until after you have reached a unanimous verdict or have been discharged. Do not disclose any vote count in any note to the court.

COURT'S INSTRUCTION NO. 55

A verdict form has been prepared for you. You will need to reach a unanimous decision on each of the questions you are asked to answer in the jury verdict form. After you have reached a unanimous agreement on a verdict, your presiding juror will fill in the form that has been given to you, sign and date it, and advise the court that you are ready to return to the courtroom.